IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6338 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHAMPUSING GHUDSING THAKORE

Versus

DIST MAGISTRATE

Appearance:

1. Special Civil Application No. 6338 of 2001

MR AR SHAIKH for Petitioner No. 1

MR SS Patel, APP,for Respondents No. 1-3

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 09/01/2002

ORAL JUDGEMENT

1. The petitioner has been detained by an order passed by the District Magistrate, Banaskantha, at Palanpur, on the 5th July, 2001, in exercise of powers under Section 3(1) of the Gujarat Prevention of

Anti-Social Activities Act, 1985 ("PASA Act" for short).

2. The detaining authority took into consideration two offences registered against the petitioner, so also the statements of two anonymous witnesses. The detaining authority considered the activities of the detenu as that of a bootlegger and observed that the petitioner is required to be immediately prevented from pursuing his activities, which are detrimental to public order. The authority also considered the possibility of resorting to less drastic remedies and came to conclusion that detention under PASA Act is the only remedy that can be resorted to.

3. The petitioner challenges the order of detention on various grounds. Ms. Dutta, learned advocate appearing for Mr. Shaikh, learned advocate for the petitioner, contended that the verification has not been done by the detaining authority, but by the Dy.S.P. The grounds of detention do not indicate the material on basis of which the subjective satisfaction for exercising right under Section 9(2) of the PASA Act was exercised.

3.1 Learned advocate for the petitioner further contended that a representation dated the 24th July, 2001 made by the detenu has not been attended to and no communication is received by the detenu.

4. Mr. Patel, learned Assistant Government Pleader, has opposed this petition. He stated that the verification was done by the Dy.S.P. at the instance of the detaining authority and on basis of that verification, a subjective satisfaction has been specifically recorded by the detaining authority. He also contended that the representation was sent to the detaining authority, but because detaining authority had become functus officio by then, it was immediately despatched by Fax to the Government. It was decided on the 3rd August, 2001 and was communicated on the 8th August, 2001. Between these two days, there were holidays and, therefore, the delay in communication.

5. Having regard to the contentions raised, the petition deserves to be allowed on the ground that the subjective satisfaction recorded by the authority about the statements of anonymous witnesses and the fear expressed by them is without proper verification. Admittedly, the detaining authority has not verified the statements about the genuineness of the fear expressed by the witnesses and the need for exercise of powers under Section 9(2) of the PASA Act. The verification of the

statements made by the Dy.S.P., if read, only indicates that he has verified that the witnesses suffer from genuine fear and volunteered to give statements only on condition that they would not be required to depose. In this regard, the decision in the case of Bai Amina v. State of Gujarat & Ors., 1981 GLR 1186 can be referred to. While considering this question, the Division Bench observed as under :-

> "If the disclosure of the particulars and materials and the sources from which they are obtained is not to be made on the ground of promise of confidentiality made to the informant in view of this apprehension that he would be visited with dire consequences if the detenu came to know that he was the source from which the particulars and materials were gathered, the detaining authority must be fully satisfied that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. The general background, character, antecedents, criminal tendency or propensity, etc. of the detenu and such of those matters as are relevant in the context of the informant must be inquired into and carefully examined by the detaining authority with a view to satisfying itself that the alleged apprehension is not imaginary or fanciful or that it is not merely an empty excuse invented by the informant, inter alia, to protect himself against the falsity of his version being exposed by an effective explanation of the detenu or to hide his own involvement or to conceal his enmity with the detenu. The detaining authority must be further satisfied that the promise of protection against reprisal would not be an effective substitute for the promise of confidentiality and that unless confidentiality is guaranteed, material information would not come forth making it impossible to exercise of power of detention."

In the above decision, a Division Bench of this Court specifically stated that bald assertion regarding non-disclosure being in public interest will not conclude the issue when exercise of privilege is challenged as mala fide, as is the instant case. The Division Bench said that the detaining authority must file an affidavit to satisfy the Court regarding application of mind and bona fide exercise of powers. The Court observed:

"Indeed, having regard to the seriousness of the question involved, the detaining authority would be well-advised to make a contemporaneous record of the grounds and reasons which weighed with it in withholding the documents, materials and particulars."

5.1 In Chandrakant N. Patel v. State of Gujarat, 1994(1) GLR 761, a Full Bench of this Court said that the decision and the ratio laid down in Bai Amina's case (supra) is a good law.

6. In this view of the matter, the statements of the anonymous witnesses cannot be considered as a valid ground for detaining the detenu as the power under Section 9(2) has not been properly exercised and it has affected the right of the detenu of making an effective representation.

7. Another ground that would vitiate the continued detention would be the delay in communicating the decision on representation. Although the petitioner has come with a case that the representation has not been considered, it is clearly made out by the learned Assistant Government Pleader that representation was decided on the 3rd August, 2001 by the Government, but it was communicated on the 8th August, 2001. The 3rd August, 2001 was a Friday and the 4th August, 2001 was a Saturday, which was declared as a holiday because of Raksha Bandhan and the 5th August, 2001 was a holiday on account of Sunday. Despite this, the decision on the representation was not communicated on the 6th August, 2001 or on the 7th August, 2001, but was communicated only on the 8th August, 2001. This delay in communicating the decision on the representation would affect the right of the detenu of making an effective representation and would vitiate the continued detention.

8. It has to be noted that affidavit in reply is not filed in the instant case. In Mohmad Sarif v. Commissioner of Police, 1997(1) GLH 1017, this Court held that, in absence of affidavit by the detaining authority and/or contemporaneous record to show that the authority applied its mind, mere reproduction of statements in order is not sufficient to uphold the detention. Keeping all these aspects, this petition deserves to be allowed.

7. In the result, the petition is allowed. The

impugned order of detention dated the 5th July, 2001, passed against the detenu is hereby quashed. The detenu-Champusing Ghudsing Thakore is ordered to be set at liberty forthwith, if not required in any other matter. Rule is made absolute with no orders as to costs.

[A.L. DAVE, J.]

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